GLENIS DAPHNE HYACINTH EDMONDS *a*

v.

PUTHANPURAKAL JOHN KOSHY

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J *b*
[JUDICIAL SEPARATION NO: 33-89-1992]
24 OCTOBER 1996

FAMILY LAW: *Separation - Judicial - Maintenance payments - Whether application was ancillary relief* *c*

FAMILY LAW: *Matrimonial property - Equal division of matrimonial assets after sale - Whether application for interim payment within the ambit of equality of division - Whether application within meaning of r. 2(1) of Divorce and Matrimonial Proceedings Rules 1980 - Whether application contravenes r. 52(3) of the Act* *d*

The petitioner had applied for an order for part payment of the proceeds of the sale of a matrimonial house. The amount asked for would be taken into account when the decision for distribution of matrimonial assets was made. The respondent objected on the grounds that the application was for ancillary relief of a financial provision order within the meaning of r. 2(1) of the Divorce and Matrimonial Proceedings Rules 1980 and was therefore a duplication as the petitioner had earlier applied for relief in the form of a "property division order" to divide the matrimonial home pursuant to s. 76 of the Law Reform (Marriage and Divorce) Act 1976. Rule 52(3) of the same Act did not permit duplication. It was also argued that the application was premature for the petitioner could be entitled to more or less than the amount prayed for. *e* *f*

Held:

[1] The application was for ancillary relief and it came within the definition of r. 2(1) of the Divorce and Matrimonial Proceedings Rules 1980. The interim payment asked for came within the ambit of the principle of equality of division as enunciated in s. 76 of the Law Reform (Marriage and Divorce) Act 1976. *g*

[2] Rule 52(3) deals with "rescission of *decree nisi* by consent" which had nothing to do with the application of the petitioner for ancillary relief. The preliminary objection of the respondent was overruled. *h*

[Order in terms granted.] *i*

Case referred to:
Re Heng Peng Hoo & Anor [1989] 3 MLJ 103 ***(refd)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, rr. 2(1), 52(3), 56(1)(a)
Law Reform (Marriage and Divorce) Act 1976, s. 76

For the petitioner - Fong Teng Fook; M/s. Fong & Partners
For the respondent - S. Kanawagi; M/s. Khana & Co.

JUDGMENT

Low Hop Bing J:

Application

In the petitioner's application *vide* Encl. (54), the petitioner prays for an order that the petitioner be paid a sum of RM275,000; being part of the proceeds of sale of a matrimonial house pursuant to a sale and purchase agreement dated 26 March 1996, to enable the petitioner to buy a house for her residence, pending a decision on her petition and such sum shall be taken into account when a decision for distribution of matrimonial asset is finally made.

Preliminary Objection By Respondent's Counsel

The respondent's Counsel raises the following preliminary objections:

(1) Enclosure (54) is an application for ancillary relief of a "financial provision order" within the meaning given in r. 2(1) of the Divorce and Matrimonial Proceedings Rules 1980. It is a duplication which r. 52(3) of the said rules does not permit. The duplication arises because the petitioner has already applied for relief in the form of a "property division order" in Encl. (5), to divide the matrimonial home, under r. 56(1)(a), pursuant to s. 76 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164). The Court has not made any order on Encl. (5) when granting the divorce.

The petitioner again applied *vide* Encl. (18) for a property division order pursuant to r. 56(1)(a) and s. 76. The Court heard Encl. (18) on 27 July 95 but, by consent of both parties, did not make a "property adjustment order" but instead made a "sale order" under s. 76 and ordered that the matrimonial property be sold and the proceeds thereof be held jointly by both the solicitors of the parties herein.

(2) The Court has not made an Order in Encl. (18) to divide the proceeds of sale of the matrimonial home. The petitioner's application in Encl. (54) is premature, for the petitioner may be entitled to more than RM275,000 or less. The petitioner can only make an application in Encl. (54) after the Court has confirmed her share to the said proceeds of sale.

Response By The Petitioner's Counsel

Petitioner's Counsel submitted that the reference by the respondent's Counsel to r. 52(3) and r. 56(1)(a) has caused uncertainty and confusion as they are completely irrelevant to the petitioner's application in that r. 52 deals with rescission of a *decree nisi* by consent and r. 52(3) specially requires an application for that purpose to be made to a Judge and may be heard in chambers, while r. 56(1)(a) deals with an application for "an order for maintenance pending suit". None of these matters which form the basis of the submission advanced for the respondent is part of the petitioner's application in Encl. (54).

Decision By The Court On The Preliminary Objection

The rules upon which the respondent's Counsel is relying are entirely alien to the prayers which the petitioner is seeking in Encl. (54). A careful reading of r. 52(3) clearly shows that r. 52 is dealing with "rescission of *decree nisi* by consent" which is a totally different matter and has absolutely nothing to do with an application in the nature of Encl. (54) ie, for the payment of part of the proceeds of sale of a matrimonial house. The other rule upon which the Counsel for the respondent relies ie, r. 56(1)(a), is as clear as crystal; it deals with an application for "an order for maintenance pending suit" which again is outside the ambit of the prayer in Encl. (54).

The written submission, which as analysed above, has placed a heavy reliance on r. 52 and r. 56. Although it has been signed and filed by the respondent's Counsel, it has obviously not enjoyed the benefit of a close and scrupulous scrutiny by the said Counsel. The content of the said written submission would no doubt have achieved the relevance which it deserved had it been prepared and scrutinised with meticulous care and attention, to commensurate with the quality of legal expertise expected of a senior member of the Bar. The heavy reliance by the respondent's Counsel on rules which are completely irrelevant to the subject matter in Encl. (54) will give neither credit nor credibility to the quality of his submission. A Counsel's paramount duty is no doubt to assist the Court and not otherwise. I am constrained to hold that the preliminary objection by the respondent's Counsel is completely devoid of merits and is hereby overruled.

Merits Of The Petitioner's Application

The respondent's Counsel submitted that the petitioner's application in Encl. (54) cannot be entertained by the Court as it is premature, and that the petitioner could only make the application after the Court has confirmed her part of the proceeds of sale.

The petitioner's Counsel contended that Encl. (54) was filed pending the final adjudication by the Court in relation to Encl. (18). According to him, it is based on reasonable grounds.

In my judgment, this application in Encl. (54) is for ancillary relief, which is defined in r. 2(1) of the said Rules as meaning, *inter alia*, "a property adjustment order". The order prayed for by the petitioner is to my mind within the definition of "property adjustment order" as defined in r. 2(1). The property in question ie, the matrimonial home at No. 12, Jalan Pisang, Batu 3 3/4, Jalan Kelang Lama, 58100 Kuala Lumpur is subject to an order made by James Foong J on 27 July 1995 in the petition herein. This order, which is still subsisting and binding on the parties hereto, is to the effect that the said property be sold by private treaty and the proceeds of sale and the balance thereof, be deposited in one account in the name of the solicitors for both the parties herein, *viz.* Encik S Kanawagi and Encik Fong Teng Fook, until further order of the Court. That being the case, it is obvious that the proceeds of sale shall be held until the petitioner or the respondent or both of them apply to this Court for a further order. It is therefore perfectly within the right of the petitioner or for that matter the respondent, if the respondent so desires, to apply to this Court for a further order, which is precisely what the petitioner has done in Encl. (54). The proceeds of sale obviously belong to both of them in equal shares. No reasonable person or Counsel can justifiably raise any objection to the application of the petitioner. Indeed, no valid ground has been raised by the respondent's Counsel in relation to the merits of this application. Indeed I can see no legitimate ground whatsoever which can constitute any credible attack on the said application. In fact, there is none. The respondent is merely saying that the petitioner may be entitled to more than the RM275,000 sought in the application in Encl. (54), or less as the quantum is uncertain. The proceeds of sale amounted to RM900,000 and the sum sought by the petitioner is less than one-third thereof. In relation to the distribution of matrimonial assets, s. 76 of the Law Reform (Marriage and Divorce) Act 1976 is expressly stated as being in favour of an equality of division generally. This consideration for equality of division is also expounded and upheld by Mohd Dzaiddin J (now FCJ) *Re Heng Peng Hoo & Anor.* [1989] 3 MLJ 103, at p. 105.

Since the petitioner is only asking for an interim payment amounting to less than one-third of the proceeds of sale of the matrimonial home, this clearly comes within the ambit of the principle of equality of division enunciated in s. 76. In the circumstances, I make an order in terms of this application, with costs both on the preliminary objection to the petition and the merits of the petition.

Reported by Michele Saw